Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–22–151 OF 1999
JAMES FOONG J
12 JANUARY 2006

Contract — Damages — Remoteness — Leaving fan on unattended for six days running the risk of fire — Whether first defendant could have foreseen the intervening conduct of the second defendant's or third party — Whether novus actus interveniens applies in the circumstances of the case

Tort — Negligence — Res ipsa loquitor — Plaintiff's premise flooded with water from floor above — Precise cause could not be shown — Whether doctrine of res ipsa loquitor applicable

The plaintiff is a tenant of a building and has a contractual relationship with the second defendant, the owner and landlord of the building. The first defendant, also a tenant of the building whose premises is right above the plaintiff's premises has a tenancy agreement with the second defendant. The first defendant has a computer server installed in a room at its premises. They had placed a fan to cool the server instead of paying for the building air condition supply. What discouraged them from seeking cool air from the central air-condition system was cost. Since the fan was running continuously for almost six days, during the long holiday break, it must have either short circuited or just burned out causing a fire. Water was then discharged from the sprinkler in the server room which was necessary to put out the fire. The plaintiff's premises was flooded due to water seepage from the first defendant's floor above. The plaintiff claimed from its insurers, Aetna Insurance Company ('Aetna'). To recuperate, Aetna brought this action, by way of subrogation against the first defendant for negligence and against the second defendant, as landlord for the plaintiff's premises for breach of tenancy agreement as well as negligence. The second defendant sought protection under an exemption clause. The second defendant also seeks indemnity from the third party. The third party is or was at all material times a professional building manager engaged by the second defendant to run and operate the building. Both the defendants and the third party blamed each other for the damage caused to the plaintiff.

Held:

(1) As against the second defendant, the exemption clause only applies if there is no willful default or breach of the tenancy agreement by the landlord. The landlord has breached a term of the tenancy agreement by failing to

provide quiet and peaceful enjoyment to the plaintiff. The second defendant has failed to discharge its contractual obligation. Hence s 74 (3) of the Contracts Act 1950 applies. The second defendant is liable to the plaintiff for breach of contract (see paras 23–24).

(2) The plaintiff has pleaded res ipsa loquitor. Here, when there is prima facie evidence of negligence but the precise cause of which could not be shown except that it is more probable than not that it was due to an act or omission of the defendant for failing to take proper care, then it is upon the defendant to prove otherwise. Regrettably, the first defendant has failed to rebut this presumption (see para 29).

(3) There is no break in the chain of causation nor is the act of the first defendant so remote that the original wrong of the first defendant was merely a part of history and the second defendant's as well as the third party's acts were wholly independent of that of the first defendant. The first defendant could have foreseen the intervening conducts of the second defendant's or third party. Leaving the fan on unattended for almost six days would certainly run the risk of catching fire. And when fire is ignited there would be heat. The heat would in turn activates the sprinkler. Once activated, water would be discharged from the sprinkler. Water would be expected to flow-downwards, particularly to premises directly below and such element has a tendency to destroy and damage goods kept in such places (see para 31).

(4) The letter of appointment of the third party as the building manager has indeed allowed the second defendant to seek indemnity from the third party for the negligence of the third party employee. For this, the second defendant should be entitled to indemnify to a certain degree for the wrong committed by the third party (see para 40).

[Bahasa Malaysia summary

Plaintif ialah penyewa sebuah bangunan dan mempunyai hubungan kontraktual dengan defendan kedua, pemilik dan tuanpunya bangunan tersebut. Defendan pertama, juga penyewa bangunan tersebut yang mana premisnya berada di atas premis plaintif juga mempunyai satu perjanjian penyewaan dengan defendan kedua. Defendan pertama mempunyai satu server komputer yang dipasang di sebuah bilik di premisnya. Mereka telah meletakkan satu kipas untuk menyejukkan server tersebut sebagai ganti membayar untuk perkhidmatan hawa dingin daripada bangunan tersebut. Apa yang tidak menggalakkan mereka daripada mendapatkan perkhidmatan pusat sistem hawa dingin ialah kos. Oleh kerana kipas telah dikendalikan berterusan selama hampir enam hari, ketika cuti yang panjang, ia berkemungkinan sama ada telah mengakibatkan lintar pintas atau telah terbakar yang menyebabkan api. Air kemudiannya dikeluarkan daripada sistem permercik di bilik server untuk memadamkan api tersebut. Premis plaintif dibanjiri air yang meresap daripada bilik defendan pertama tersebut di atas. Plaintif menuntut daripada insurannya, Aetna Insurance Company ('Aetna'). Untuk mendapatkan balik tuntutan plaintif, Aetna mengambil tindakan ini, secara subrogasi, terhadap defendan pertama untuk kecuaian dan terhadap defendan kedua, sebagai tuanpunya kepada premis plaintiff, untuk perlanggaran perjanjian penyewaan dan juga kecuaian. Defendan

kedua meminta perlindungan di bawah satu fasal pengecualian. Defendan kedua juga menuntut indemniti daripada pihak ketiga. Pihak ketiga ialah dan telah pada kesemua masa yang material pakar pengurusan bangunan yang diambil oleh defendan kedua untuk mengendalikan bangunan tersebut. Kedua-dua defendan dan pihak ketiga menyalahi sesama sendiri terhahap kerosakan yang dialami oleh plaintif.

Diputuskan:

(1) Terhadap defendan kedua, fasal pengecualian hanya boleh dipakai sekiranya tiada kegagalan yang disengajakan ataupun perlanggaran perjanjian penyewaan oleh tuanpunya bangunan. Tuanpunya bagunan telah melanggari satu terma di dalam perjanjian penyewaan dalam kegagalannya memberikan plaintif menikmati kedamaian dan keamanan. Defendan kedua telah gagal menunaikan obligasi kontraktualnya dengan itu s 74(3) Akta Kontrak 1950 terpakai. Defendan kedua adalah bertanggungjawab kepada plaintif untuk kemungkiran kontrak (lihat perenggan 23–24).

(2) Plaintif telah memplidkan res ipsa loquitor. Di sini, terdapat bukti prima facie kecuaian tetapi kausa yang tepat tidak dapat ditentukan hanya bahawa besar kebarangkalian ia disebabkan oleh tindakan atau ketinggalan defendan kerana gagal mengambil perhatian yang betul, dan ia adalah ke atas defendan untuk membuktikan sebaliknya. Malangnya, defendan pertama gagal mematahkan anggapan ini (lihat perenggan 29).

(3) Tiada pematahan dirantai penyebaban ataupun tindakan defendan pertama begitu jauh sehingga kesalahan asal defendan pertama hanya sekadar sejarah dan tindakan defendan kedua dan juga pihak ketiga adalah berasingan sama sekali daripada tindakan defendan pertama. Defendan pertama seharusnya dapat meramal tindakan mencelah defendan kedua ataupun pihak ketiga. Dengan membiarkan kipas berjalan tanpa dikawal selama hampir enam hari berturut-turut dengan tentunya akan mengalami risiko ia terbakar. Dan apabila terdapat api, setentunya terdapat haba. Haba tersebut akan mengaktifkan sistem permercik. Apabila diaktifkan, air akan dikeluarkan daripada pemercik. Air tersebut dijangka akan mengalir ke bawah, terutamanya ke premis di bawah dan akan memusnah dan merosakkan barangan yang disimpan di tempat tersebut (lihat perenggan 31).

(4) Surat lantikan pihak ketiga sebagai pengurus bangunan telah membenarkan defendan kedua menuntut indemniti daripada pihak ketiga untuk kecuaian pekerja pihak ketiga. Berdasarkan ini, defendan kedua berhak kepada indemniti pada tahap yang tertentu terhadap kesalahan yang dilakukan oleh pihak ketiga (lihat perenggan 40).]

Notes

For cases on remoteness of damages, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2975–2978.

For cases on res ipsa loquitor, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1027–1055.

Cases referred to

Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor [1991] 1 CLJ 151 (refd)
Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428 (refd)
Bourhill v Young [1943] AC 92 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Noor Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor [1991] 1 CLJ 151 (refd)
Wagon Mound, The (No 1) [1961] AC 388 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Civil Law Act 1956 s 10(2)
Contracts Act 1950 s 74(3)

Sreether Sundaram (S Chrishanthini with him) (Murali B Pillai & Associates) for the plaintif.
Lam Ko Luen (Visalrani Rajendram with him) (Shook Lin & Bok) for the first defendant.
Vanaja Dewi Nambiar (Isharidah, Ho, Chong & Menon) for the second defendant.
YM Tunku Farik bin Tunku Ismail (Ng Lee Meng with him) (Azim, Tunku Farik & Wong) for the third party.

James Foong J:

FACTS

[1] In 1998, many Malaysians had the good fortune to enjoy a continuous six day holiday commencing from 28 January to 2 February. The 28 and 29 January was Chinese New Year; 30 and 31 January was Hari Raya; the 1 February was City Day but being a Sunday, 2 February was substituted as a public holiday for those in the Federal Territories, such as Kuala Lumpur. After such a long break many like the staff in the plaintiffs were eager to return to work at the plaintiff's premises at suite 4.01 on the 4th floor, Menara Keck Seng (the building), Jalan Bukit Bintang, Kuala Lumpur (plaintiff's premises). But they were in for a shock and disbelief. The plaintiff's premises was flooded with water that seeped from the floor above. It happened in this manner:

[2] The occupant of the floor above was the first defendant who is, or was, involved in telecommunication business. A computer server was installed in a room at its premises on the 5th floor. As this server was required to be on 24 hours a day, cooling was necessary to prevent overheating. Normally, the cool air generated from the central air conditioning system in the building would be sufficient to keep the server running without overheating. And during weekends when the central air-condition supply was turned off in the building, the server could still function by a cooling fan placed nearby. But when this practice went on for a continuous period of six days the consequences were grave. Not that the first defendant was not aware of this potential danger. What discouraged them from seeking cool air from the central air-condition

system was cost. The landlord charged RM50.00 per hour for air-condition supply to the entire first defendant's premises. Restricted supply to the server room was not possible because of the central air-condition ducting system.

[3] At about 2 am on 2nd February, a security guard by the name of Suaranjan was on duty when he heard the alarm at the building's control centre. Suspecting that there may be a fire, he immediately investigated the floor identified on the control panel that triggered the alarm. Finding no sign of smoke or fire, he contacted the building technician called Muru. Muru was not physically in the building. He was on standby at home. After listening to Suaranjan, he advised Suaranjan to carry out further investigation and if no sign of fire or smoke is detected he should turn off the buzzer at the control panel. This, Suaranjan did. But he did not realize that there was indeed a fire in the first defendant's premises located in the server room. The heat caused by the fire must have activated the sprinkler in that room to discharge water therefrom to dose off the fire. But if the sprinkler system, controlled by butterfly valve, was not turned off, water would continue to be released from the sprinkler. This was in fact the case when water landed on ground floor. By then it was morning when employees returning to work discovered the mess. It was not until 8 am on the same morning that the butterfly valve controlling the sprinkler in the server room was reversed by the building management staff.

[4] It is revealed in evidence that the control panel had three pertinent indicators and switches associated with fire: the sprinkler, the smoke detector and the flow switch. The last will tell whether water is discharged from the sprinkler. What is therefore important in this case is whether Suaranjan after being satisfied that there was no smoke or fire, turned off the flow switch besides the other two. Unfortunately both Suaranjan and Muru could not be traced to testify before this court. At best, we have a report from the building manager, PW 6. This report was made soon after the incident from interviews with Suaranjan and Muru. As this is a contemporaneous document, I find the contents therein reflect a fairly accurate account of what took place on that fateful morning. But this report does not disclose material facts to answer the question posed. However, by common sense deduction I came to this conclusion.

[5] First, the sprinkler alarm at the control panel must have been turned off after Suaranjan's investigation otherwise the buzzer would continue to sound. The smoke indicator alarm could not have been activated since there was no corresponding gadget installed inside the first defendant's premises to pick up the smoke sense. Such dictator was only installed in the common area. The indicator in this area could not have detected the smoke since water released from the sprinkler would have put off the fire in the server room to eliminate any smoke from escaping to the common area to trigger off this indicator. This also explains why Suaranjan was unable to sniff out smoke at the common area on the 5th floor of the building when he was there to investigate. But as for the flow switch, it must have been on when the alarm sounded because water had escaped from the sprinkler to put out the fire in the server room. If it was on then Suaranjan must have turned it off otherwise the buzzer would continue to appear at the control panel to irritate him.

[6] Like all disasters, shortcomings only surfaced after the event. In this case, it is revealed that only the building manager or his technicians were authorized and had the know-how to turn off the butterfly valve to stop any sprinkler from discharging water. Security guards of the building like Suaranjan could not perform this task. It was because of this that the butterfly valve was only reversed at 8 am on 3rd February almost 6 hours after the fire alarm sounded. Of course the result was devastating. In the first defendant's own premises, 'it looked as if it had rained the previous night and we had no ceiling, the whole office was literary drenched' exclaimed the financial controller of the first defendant. In the plaintiff's premises where water had seeped from above it was ankle deep, damaging and destroying some of the plaintiff's properties.

[7] For the loss suffered by the plaintiff, the plaintiff claimed from its insurers: Aetna Insurance Company (Aetna). Aetna, after investigation by its adjuster, paid out to the plaintiff a sum of RM245,701.26. The expenses charged by the adjuster for this exercise was RM13,891.00. To recuperate, Aetna brought this action, by way of subrogation against the first defendant for negligence and against the second defendant as landlord for the plaintiff's premises for breach of tenancy agreement as well as negligence. Feeling that the building manager, whom the second defendant had engaged to manage the building was responsible for the damage, the second defendant seeks indemnity from the third party. Both the defendants and the third party blamed each other for the damage caused to the plaintiff.

[8] Since this case involves multi parties with claims and cross claims, it is necessary to reiterate their relationship with one another. First, the plaintiff being a tenant of the building has a contractual relationship with the second defendant, the owner and landlord of the building. The first defendant, also a tenant of the building whose premises is right above the plaintiff's premises has a tenancy agreement with the second defendant. Blaming the first defendant for starting the incident, the plaintiff is suing the first defendant for negligence. The third party is or was at all material times a professional building manager engaged by the second defendant to run and operate the building. Since Muru was a staff member of the third party, the second defendant is seeking indemnity from the third party. As for Suaranjan, although he took instructions from the third party employee, he was paid by the second defendant.

Plaintiff's claim against the first defendant and defences of the first defendant

[9] The plaintiff's claim against the first defendant is for the negligence in causing the loss of RM245,701.26 to property and a sum of RM13,891.00 spent on adjuster's fees.

[10] The defences advanced by the first defendant are: (a) the first defendant owed no duty of care to the plaintiff and that the damages suffered by the plaintiff were not reasonably foreseeable (b) the conduct of the second defendant and/or the third party constituted a *novus actus interveniens* which absolves the first defendant from liability (c) the damage caused to the plaintiff was too remote and (d) the plaintiff had failed to adduce evidence to prove quantum.

[11] In paragraph six of its statement of defence, the first defendant seeks indemnity from the second defendant who is blamed for the accident.

Plaintiff's claim against the second defendant and defences of the second defendant

[12] As indicated, the plaintiff's claim against the second defendant is based on two causes of action: breach of contract and negligence. For breach of contract, the plaintiff relies on cl 7.1 of the tenancy agreement where it is stipulated that the plaintiff is entitled to a quiet and peaceful enjoyment of its premises 'without any interruption or disturbances from the landlord or any other person or persons lawfully claiming by or from or under or in trust for the landlord'.

[13] The second defendant denied that it had committed any breach of tenancy agreement and even if there was a breach, the second defendant is exempted from liability by virtue of an exemption clause in the tenancy agreement. Further, the second defendant maintains that damages suffered by the plaintiff must be proved.

[14] As regards to the claim of negligence, the second defendant blames the first defendant.

Second defendant's claim for indemnity against the third party

[15] The second defendant's claim for indemnity from the third party is based on terms and conditions of appointment of the third party as manager of the building. One of the terms demand that the third party: report on the defects of the building, guard the building, ensure safety of the occupants of the building and to indemnify the second defendant of any claims caused to anyone as a result of the third party's failure and negligence in carrying out its duties. As a result of the incident, the second defendant claims that the third party has to indemnify the second defendant for the claims made by the other parties.

[16] One of the defences raised by the third party is the existence of an arbitration clause in the agreement which requires dispute between the second defendant and the third party to be resolved by arbitration. But since the third party had submitted to the jurisdiction of this court by taking steps in this proceeding to defend itself, I find that this assertion no longer has legal effect. It must be considered abandon by the third party. The other defence of the third party is that the cause of the incident was due to the negligence of the first defendant.

APPROACH

[17] To consider this case I shall proceed first to deal with the cause of action for breach of contract. This concerns only the plaintiff and the second defendant. Then I shall move on to negligence which involves all parties in this action.

BREACH OF CONTRACT

[18] According to the plaintiff, cl 7.12 of the tenancy agreement with the second defendant provides:

QUIET ENJOYMENT OF DEMISED PREMISES

*The Landlord hereby covenants with the Tenant that the Tenant duly and punctually paying the monthly Rent and Service Charge hereby reserved and observing and performing the several covenant obligations provisions and stipulations contained in this Tenancy on the Tenant's part hereinbefore contained may subject to the applicable Rules and Regulations of the Building*peaceably hold and enjoy the Demised Premises for the Term hereby granted without any interruption or disturbance from the Landlord or any other person or persons lawfully claiming by or from or under or in trust for the Landlord (Emphasis added.)

[19] As a result of what has happened, the plaintiff claims that the second defendant had breached this condition.

[20] Attempting to escape from such obligation, the second defendant sought protection under an exemption clause in the tenancy agreement. This is cl 7.3 which reads:

EXEMPTION OF LANDLORD FROM LIABILITY:

Save and except in the case of wilful default or a breach of this Tenancy by the Landlord, the Landlord shall not be liable to the Tenant, nor shall the Tenant have any claim against the Landlord in respect of: any damage, injury or loss arising out of the leakage of the piping, wiring and sprinkler system in the Demised Premises and/or the Building and/or the structure of the Building.

[21] But as correctly pointed out by the plaintiff's counsel, this exemption clause only applies if there is no willful default or breach of the tenancy agreement by the landlord. In this case however, the landlord has breached a term of the tenancy agreement by failing to provide quiet and peaceful enjoyment to the plaintiff. This was caused by the acts of the second defendant and the third party which I will be elaborating shortly in this judgment.

[22] Further, if one peruses cl 7.3 of the tenancy agreement, it only speaks of damage arising from leakage of pipe, wiring and sprinkler system. This did not happen here. There is no evidence to indicate such leakage from such conduits. The discharge of water from the sprinkler was a deliberate and intentional act to put out the fire. When the facts do not fit the condition expressed in this exemption clause, then the second defendant is not entitled to benefit from it.

[23] When the second defendant had failed to discharge its contractual obligation then s 74 (3) of the Contracts Act 1950 provides:

Compensation for failure to discharge obligation resembling those created by contract

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

[24] For this, I hold the second defendant liable to the plaintiff for breach of contract.

NEGLIGENCE OF THE FIRST DEFENDANT

Principles of negligence

[25] On the cause of action for negligence it is best to start my analysis with the basic principle set out by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at p 580:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[26] Expanding on the foreseeable test, Lord Russell in*Bourhill v Young* [1943] AC 92 declares:

> In considering whether a person owes another a duty of care, breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man.

[27] From these doctrines, one could observe that foreseeability is a pertinent factor that must be proved by the plaintiff in a negligence suit. This equally applies to damages. This means that there must be some concrete evidence of the wrongdoing link to the injury suffered by the plaintiff. To prove this, the plaintiff must establish a prima facie connection between the wrongdoer and the damage caused. In this context, with regards to the first defendant, the plaintiff must prove that it was the first defendant's fault that caused or materially contributed to the damage suffered by the plaintiff. This means that one must begin by asking: whether the damage which the plaintiff suffered would have occurred 'but for' the negligence of the first defendant?' (see *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. Putting it in another way: could the first defendant, as a reasonable man, foreseen that the damage caused to the plaintiff would be of a kind that a reasonable man should have foreseen or expected (see *The Wagon Mound (No 1)* [1961] AC 388).

[28] There is no doubt that it was the first defendant who started the chain of events leading to the damage caused. The first defendant had placed a fan to cool the server instead of paying for the building air condition supply. Since the fan was running continuously for almost six days it must have either short circuited or just burned out causing a fire. This finding is derived from evidence of the burned fan, carpet, darkened walled and ceiling in the server room and the wet floor and floods

caused by water discharged from the sprinkler in the server room which was necessary to put out the fire there.

Res ipsa loquitor res ipsa loquitor

[29] But though the defendant was the original wrongdoer who triggered off the incident but it was the subsequent events which eventually caused the damage to the plaintiff. Commencing from the sound of the alarm at the control panel, Suaranjan must have noticed the flow switch activated, otherwise there would be no water released from the sprinkler to put out the fire. But did Suaranjan tell Muru about this and if he did, did Muru instruct him to switch it off? But then switching it off is not sufficient. Muru or some technicians from the third party must be physically present to turn off the butterfly valve as well. Suaranjan, as a security guard, cannot perform this task. When the valve was not turned off water from the sprinkler would continue to discharge. And this was exactly what happened. Water continued to be discharged from the sprinkler for six hours. As stated, there is no evidence advanced by anyone to prove this fact. Of course, in normal situation, the plaintiff carries such burden of proof. However, the plaintiff has pleaded res ipsa loquitor. Here, when there is prima facie evidence of negligence but the precise cause of which could not be shown except that it is more probable than not that it was due to an act or omission of the defendant for failing to take proper care, then it is upon the defendant to prove otherwise. Regrettably, I find that the first defendant had failed to rebut this presumption.

novus actus interveniens

[30] The first defendant argued that even if it was the initiator of the negligence but the conduct of the second defendant and/or the third party constituted a novus actus interveniens defendant from liability. This concept of novus actus interveniens acts in this manner: If a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the initial tortuous conduct, then the defendant's responsibilities may not extend to the consequences of the supervening event. In short, if there is a break in the chain of causation then the original wrong doer is not liable for starting the wrong (see *Clerk & Lindsell on Torts* (17th Ed) at para 2–24).

[31] But in this case, I could not detect any break in the chain of causation nor could I find that the act of the first defendant to be so remote that the original wrong of the first defendant was merely a part of history and the second defendant's as well as the third party's acts were wholly independent of that of the first defendant. I feel that the first defendant could have foreseen the intervening conducts of the second defendant's or third party. Leaving the fan on unattended for almost six days would certainly run the risk of catching fire. And when fire is ignited there would be heat. The heat would in turn bust the sprinkler bulb to activate the sprinkler. Once activated, water would be discharged from the sprinkler. Such water would be expected to flow-downwards, particularly to premises directly below and such element has a tendency to destroy and damage goods kept in such places. The first defendant may argue that sufficient amount of water would be enough to put out a small fire in the server room rather than the excessive quantity in this case. But then,

who would have known what quantity of water was required to dose off the fire at the server room when there was no one there at the material time to witness the intensity of the fire. As to the acts of Suaranjan and Muru, these too could have been foreseen in.the light of the degree of intelligence and mental attitude expected from this category of workers. They are not so remote in our current social conditions. For these reasons. I find that the defence of *novus actus interveniens* does not apply in the circumstances of this case.

Proof of actual damage

[32] The next complaint of the first defendant is that the plaintiff had not proved actual damage. I am surprised by this allegation when the insurance adjuster (SP 3) had advanced material evidence to justify the loss suffered by the plaintiff and there was no question posed by the first defendant to challenge this aspect of his evidence. This tantamounts to an acceptance of his testimony on this matter (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) declared:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony … On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of *New Zealand in Transport Ministry v Garry* where Haslam J said at (p 122):
>
> > In Phipson on Evidence (11th Ed) paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz, where ' … the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called on the same point, it is not always necessary to cross examine them all.

[33] And this principle was applied with equal force in civil cases of *Noor Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor* [1991] 1 CLJ 151.

NEGLIGENCE OF THE SECOND DEFENDANT

[34] Since the second defendant is also sued for negligence, I shall now proceed to analyze its position.

[35] Here the negligent acts or omissions of this defendant are centered on Suaranjan, an employee of the second defendant. Though Suaranjan may have taken instructions from the third party, I find that this type of instruction insufficient to consider him as being under the control of the third party. For this, the second defendant would be vicariously liable for his actions or omissions in this incident.

[36] Suaranjan's acts and omissions are already discussed in substantial detail above. For what he has done or omitted to do, I find him to be negligent for these reasons: First, he failed to detect the large amount of water that was virtually flowing down each floor. I believed that if he had conducted his round on each floor diligently and at regular intervals, he would have detected the presence of water which must have originated from the time when the fire alarm came on. Then he could have telephoned Muru to request Muru's presence to reverse the butterfly valve which he could perform himself. Second, as I have pointed out earlier, he must have turned off the flow switch without first ascertaining whether water was released from the sprinkler. Since I find that these wrongdoings could have been foreseen by a reasonable man to result in the kind of damage suffered by the plaintiff, the second defendant, as an employer of Sauranjan, must be held vicariously liable to the plaintiff.

[37] The claim that the plaintiff had failed to prove damages, on identical ends stated on this same issue raised by the first defendant, I find no merit in its assertion.

Contribution & indemnity by the second defendant against the third party

[38] The second defendant attempted to lay blame for all the misfortunes on the elders of the third party as the building manager of the building. Under the appointment of the building manager, the second defendant insists that it is to be compensated by the third party for the negligence committed by a servant and/or agent of the third party.

[39] In my view that not only Suaranjan was negligent. Muru too must bear in degree of blame. He should have either requested for more information from Suaranjan on whether the flow switch indicator was on in the first place. If it was activated, then by instructing Suaranjan to turn it off and cause water to continue to pour out of the sprinkler unless the valve was also reversed. And to stop this water from flowing his pratical presence or that of another technician from the third party was necessary. In this instance, he should have attended to this emergency personally since he was the man on standby. Without extracting more information from Suaranjan or giving him the wrong instruction as well as being physically present at the scene, I find him negligent. He could foresee that his acts or omissions as described could cause damage on the plaintiff's goods and properties. And as an employee of the third party, costs and omissions are attributed to the third party vicariously.

[40] The letter of appointment of the third party as the building manager had indeed allowed the second defendant to seek indemnity from the third party for the negligence of the third party employee. For this, the second defendant should be entitled to indemnify to a certain degree for the wrong committed by the third party

FINDINGS

Against the first defendant

[41] I find that the plaintiff has proved its case against the first defendant for negligence. The first defendant shall pay to the plaintiff RM259,592.26 with interest thereon at 8% pa from date of filing to date of realization together with costs.

Against the second defendant

[42] I find that the plaintiff had proved its case against the second defendant for both negligence and breach of contract. The second defendant shall pay to the plaintiff RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization together with costs.

Contribution from the second defendant to the first defendant

[43] Since the first defendant has, in its pleadings and in its submissions mounted a claim for contribution from the second defendant, the second defendant shall contribute 50% of RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization to the first defendant. This is allowed under s 10(2) of the Civil Law Act 1956.

Indemnity from the third party to the second defendant

[44] In respect of the claim for indemnity by the second defendant against the third party, the third party shall pay to the second defendant 25% of the RM259,592.26 with interest thereon at 8% per annum from date of filing to date of realization. There shall also be costs to the second defendant against the third party on the third party notice.

ORDERS

[45] Accordingly, I hereby order that:

(1) The first and second defendants shall pay to the plaintiff a sum of RM259,592.26 with interest thereon at 8% pa from date of filing to date of realization together with costs.

(2) The second defendant shall contribute 50% of RM259,592.26 with interest thereon at 8% pa from date of filing to date of realization to the first defendant.

(3) The third party shall indemnify the second defendant of 25% of RM259,592.26 with interest thereon at 8% pa from date of filing to date of realization. The third party shall pay costs to the second defendant on the third party notice.

Order accordingly.

Reported by Sally Kee